Re A and B (Minors)

HIGH COURT (SHAH ALAM) — ORIGINATING SUMMONS NO 24–373–91
KC VOHRAH J
16 OCTOBER 1996

Family Law *— Children — Custodianship — Variation of custody order — Welfare of children paramount — Whether interim custody order should be varied — Guardianship of Infants Act 1961 s 11*

The applicant ('W') was granted an interim order ('the order') in an ex parte application, for the temporary care, custody and control of her two daughters aged nine and 12 years old ('the children'). The respondent ('H'), the husband of the applicant, applied for a variation of the order for H to have the care, custody and control of the children. Evidence were tendered, inter alia, to show that while the children were with W, they were usually in the care of paid foster parents or left on their own without supervision and were deprived of the warmth and the stable environment of family life. A welfare report was also tendered which indicated that the children were more at ease and comfortable with H than W and that the children preferred to be with H.

Held, allowing the application:

In considering the custody of the children, the welfare of the children should be the paramount consideration and took precedence over the claims of the unimpeachable parent and the justice of the case as between the parents. After considering all the relevant facts of the case, it was clear that the children should be placed under the care and control of H (see pp 158A, F–G and 159D–E); *Re KO (an infant)* [1990] 1 MLJ 494, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, *J v C* [1970] AC 668, *Re K (Minors)* [1977] Fam 179 and *S (BD) v S (DJ)* [1977] Fam 109 followed.

[Bahasa Malaysia summary

Pemohon ('W') telah diberikan perintah interim ('perintah tersebut') dalam suatu permohonan ex parte, untuk jagaan dan kawalan sementara ke atas dua orang anak perempuannya yang berumur sembilan dan 12 tahun ('si anak'). Penentang ('H'), suami pemohon, telah membuat permohonan untuk pengubahan kepada perintah tersebut supaya H mendapat jagaan dan kawalan atas si anak. Keterangan dikemukakan, antara lain, untuk menunjukkan bahawa semasa anak berada dengan W, mereka biasanya dalam jagaan ibu bapa angkat yang digaji atau dibiarkan tanpa pengawasan dan tidak mempunyai kasih sayang dan persekitaran keluarga yang stabil. Suatu laporan kebajikan juga dikemukakan yang menunjukkan bahawa si anak lebih selesa dan tidak canggung bergaul dengan H berbanding dengan W dan bahawa si anak lebih suka berada dengan H.

A **Diputuskan**, membenarkan permohonan:

Dalam mempertimbangkan jagaan si anak, kebajikan si anak harus menjadi pertimbangan yang paling utama dan mengambil keutamaan atas tuntutan ibu bapa yang tidak dapat disangsikan dan keadilan kes di antara ibu bapa. Selepas mempertimbangkan semua fakta kes
B yang relevan, adalah jelas bahawa si anak patut diletakkan di bawah jagaan dan kawalan H (lihat ms 158A, F–G dan 159D–E); *Re KO (an infant)* [1990] 1 MLJ 494, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189, *J v C* [1970] AC 668, *Re K (Minors)* [1977] Fam 179 dan *S (BD) v S (DJ)* [1977] Fam 109 diikut.]

C **Notes**

For cases on custodianship of children, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 1766-1831.

Cases referred to

D *J v C* [1970] AC 668 (folld)
K (Minors), Re [1977] Fam 179 (folld)
KO (an infant), Re [1990] 1 MLJ 494 (folld)
Mahabir Prasad v Mahabir Prasad [1982] 1 MLJ 189 (folld)
S (BD) v S (DJ) [1977] Fam 109 (folld)

E **Legislation referred to**

Guardianship of Infants Act 1961 s 11

M Vadiveloo (*Veloo & Co*) for the applicant.
Vignesvary Alahakone (*Azlin Alahakone & Associates*) for the respondent.

F

KC Vohrah J: The respondent ('H'), the husband of the applicant ('W'), applied through encl 54 for a variation of an interim order made on 12 July 1991 where the temporary care, custody and control of two children, A and B were given to their mother, W, on her ex parte application. The
G variation sought for was for H to have the care, custody and control of the two girls. After a protracted hearing, which included a period during which the parties tried to come to a settlement, I gave the variation order sought for and allowed access to the mother for every weekend from Saturday at 3pm to 8pm the next day and for the first half of every vacation.

H and W were married in 1982 and A was born on 14 October 1984.
H B was born two years later on 8 July 1986.

Both H and W lived in Kajang after their marriage. H was then managing an electrical firm in Kajang while W worked as a legal secretary in Kuala Lumpur.

In 1983, H and W started having matrimonial problems and, in
I 1990, W left the home and stayed in an apartment in Kuala Lumpur. Through the efforts of a mutual friend, H visited W every weekend at her apartment and things between them improved until 1991. They still live apart and their relationship can hardly be said to be good.

To come back to the children, from the time the children were born till 1991 when the father, H, brought the children under his care, the children lived away from their parents with the second child living with the mother for two months only after her birth. When A was born, W's sister took care of her for nine months in her own house after which she was given to a baby sitter and then to another who took care of her at her house in Segambut, Kuala Lumpur. B was given, two months after her birth to the care of the last baby sitter who looked after A.

W did visit the children during weekdays on her way home from Kuala Lumpur where she worked.

A was brought home every Saturday and Sunday during her stay with the baby sitter. While the couple were living in Kajang, the second child was never brought to visit them and, when the couple shifted to Cheras in 1987, the second child visited them on two occasions.

After hearing all the evidence, I was satisfied that W refused to allow a maid to be hired to look after the children in the matrimonial home at Kajang even as she refused to allow the children to be taken care of by his family members including his parents in Kajang. My distinct impression of W was that she was used to having her way and, while she was concerned about her children, she allowed her own personal interests to prevail over their interests.

H was naturally also concerned for the children. He was dissatisfied that the children lived apart from him and his wife and that dissatisfaction was one of the reasons that made him leave the matrimonial home in Cheras and go back to stay with his parents. I was satisfied that on 24 June 1991, he took the children away from the baby sitter so that as, he stated, they could be with 'a parent at least'. His reason was a good one: 'They were growing up fast and I think it was my duty to give them the love as a father'.

He filed an application (Originating Summons No 24–361–91) for the custody of the children. W also filed her application (this matter, Originating Summons No 24–373–91) and was granted an ex parte order on 12 July 1991 for the temporary custody of the children but the children were to be placed with a baby sitter, with H having access to the children. H was slow in surrendering the children to the baby sitter; he took two months, after being served with the order to do that. W then had a quarrel with the baby sitter and removed the children to her mother's house in breach of the interim order. She subsequently returned them to the baby sitter and on 15 April 1992 again took them away from the baby sitter. She discharged her solicitors and ignored the various requests of H for access to the children but her mother secretly allowed H to have access to the children. Under threat of committal proceedings, W eventually agreed to give H access to the children on alternate weekends.

For some time (April 1992 until 1994), the children lived with W's mother in Jalan Kuching, Kuala Lumpur and eventually she managed to buy a house in Jalan Ipoh in a new housing estate which she furnished for herself and the children. They moved in there in September 1994.

A She brought the children to school on the way to work and picked them after school, bought them lunch and brought them home before proceeding to work again.

There were complaints that she was however unable to let the children to attend extra-curriculum activities in school and she also could not B attend the school concerts and prize-giving days and it was H who at the invitation of A and B went to attend them. And more importantly, the complaint was that the children were late to school most times.

On 28 December 1994, I directed a social welfare officer to investigate and report back on how the children were faring in the home and the C school environment. The report of 21 March 1995 substantiated the father's allegation (which I had grounds for believing) and his concern that the children were going to school late and they were scolded by the teachers and that they felt embarrassed. W in fact did not dispute that they went to school late but she said it was on a few occasions. The welfare D report revealed however that the children were always late for school, arriving in school at about 9am and confirmed that they did not take part in co-curriculum activities on Saturday.

I also accepted H's evidence that W would not attend school concerts and prize giving days and he attended them at the children's invitation.

E H took the children to stay with him on 21 January 1995 at their request. I accepted his evidence as confirmed by DW2, Ghafar Khan, a qualified teacher and a training and development consultant, who accompanied H (a family friend) when H took A to a clinic after she had been beaten by her mother. W did not dispute the beating but disputes why she beat her. Whatever was the reason, I accepted that the beating was F severe enough to make A nervous about going back to her mother.

H took both children from W's custody and took them out from school and brought them to his house where he arranged for them to have classes on all subjects, six times a week, two hours each time. The children were afraid to go back to school.

G One cannot help contrasting the care and attention the children had when they were with W and later when they were with H.

During the time W was in office, her two children were left alone in the house after she fetched them home from morning school where they attended standard 5 and standard 3 respectively. The house was locked H with no elder to supervise them although they each had a key. Being nine and 12 respectively, it was hardly responsible behaviour on W's part to leave them all alone by themselves in a new housing estate.

On the other hand, although H worked in his shop, the house where he lived with them was a few minutes drive from the shophouse. And the I children could go to the shophouse and interact with their relatives, like normal children with other members of the family — exchanging warmth and love instead of being cooped up in the house of an unfortunately domineering mother.

In considering the custody of the children, I had to bear in mind that the welfare of the children should be the paramount consideration. Section 11 of the Guardianship of Infants Act 1961 states:

> The court shall have regard primarily to the welfare of the infant and shall, where the infant has a parent or parents, consider the wishes of such parent or both of them, as the case may be.

In *Re KO (An infant)* [1990] 1 MLJ 494, Edgar Joseph Jr J (as he then was) examined what the provision means in the context of s 1 of the English Guardianship of Minors Act 1971, *Mahabir Prasad v Mahabir Prasad* [1982] 1 MLJ 189 and several English cases. This passage from *J v C* [1970] AC 668 at p 710, a House of Lords' case, was emphasized:

> It seems to me that they must mean more than the child's welfare is to be treated as the top item in a list of items relevant to the matter in question. I think that they connote a process whereby, when all the relevant facts, relationships, claims and wishes of parents, risks, choices, and other circumstances are taken into account and weighed, the course to be followed is that which is most in the interest of the child's welfare as that term has now to be understood. That is the first consideration because it is of the first importance and the paramount consideration because it rules on or determines the course to be followed.

As emphasized by Edgar Joseph Jr J (at p 496):

> I note that in *Re K (Minors)* [1977] Fam 179, Stamp LJ advised at p 183 that the above passage 'should be in the mind of every judge who tries an infant case' and, in *S (BD) v S (Dǰ)* [1977] Fam 109, Sir John Pennycuick said at p 119, 'it cannot be repeated too often'. Indeed, it was cited with approval by the court in *Prasad*'s case.

And as noted by Edgar Joseph Jr J, the principle that the welfare of the child is the paramount consideration was further emphasized in both *Re K (Minors)* [1977] Fam 179 and *S (BD) v S (Dǰ)* [1977] Fam 109. In *Re K*, the Court of Appeal held that the welfare of the child was a consideration that took precedence over the claims of the unimpeachable parent and the justice of the case as between the parents.

With the principles discussed as the backdrop, my considered view was that the children should be placed under the care and control of the father, H. Both parents love their children. I was mindful that the girls require a woman to grow up with considering their age, but the mother is a woman who has pursued her own interest and career to the detriment of her children and it does not appear that she would change to accommodate the growing needs of her children. For about half of their lives, the children were in the care of paid foster parents, deprived of the constant warmth of their natural mother and father and W was mostly responsible for that predicament, refusing H's suggestion for a maid to be employed and to be placed under the supervision of his relatives to take care of the children at home. Even after she had later taken custody of them, while she tried her best to cater to their needs, the children in reality were deprived of the warmth and the stable environment of family life for they were left cooped up in the house and made to fend for themselves most days after

A school and deprived of interaction with others. On most days, she brought them to school late, causing them considerable embarrassment as they were scolded by their teachers and they could not attend extra-curriculum activities. In addition, they were subject to her impatient nature and hot temper (noticeable in court) and occasional violence.

B With their father on the other hand, the growing children have the warmth, stability and security of a family life in a stress-free environment where they are allowed to interact with others, their relatives, including adult female members who are close by in the shophouse and who were always at hand to attend to their needs and give strong family support.

C In addition, the father had also greater financial stability and can always provide better amenities for them.

The welfare report which was an objective report bore out my findings. It also indicated, firstly, that the children were more at ease and comfortable with their father than with their mother and, secondly, that both being of an age where they could express independent opinions preferred to be with D their father, distinct findings which I came across when I interviewed them.

In the circumstances, I allowed variation of the order and allowed the father to have custody and care of the children. I allowed access every weekend to the mother starting at 3pm and up to 8pm the next day and for E every vacation, half of the vacation is given to the mother.

My view of W being a highly strong woman when stressed with a short fuse to her temper — and one has to be concerned about its effect on the children — was borne out in my chambers dramatically when I gave the husband care and custody of the children. As I was pronouncing the F order of custody, she got up from her chair, wailed at the top of her voice and ran out of the chamber in the presence of both counsel and interpreters. And I could hear the wail trailing away after she was out of my chambers.

Order accordingly.

G Reported by Eugene Lee Hong Whye

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